

5542. Misbranding of vodka for Passover * * *. U. S. * * * v. Russian Monopol Co., a corporation. Tried to the court and a jury. Verdict of guilty. Fine, \$199. (F. & D. No. 7381. I. S. No. 8268-h.)

On July 17, 1916, the United States attorney for the Eastern District of New York, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against the Russian Monopol Co., a corporation, Brooklyn, N. Y., alleging the sale by said company, in violation of the Food and Drugs Act, on or about February 25, 1914, under a guaranty that the article was not misbranded within the meaning of the said act, of a quantity of an article labeled in part, "Vodka for Passover," which was a misbranded article within the meaning of the said act, and which said article, in the identical condition in which it was received, was shipped by the purchaser thereof, on or about March 4, 1915 [1914], from the State of New York into the State of Pennsylvania, in further violation of the said act.

Analysis of a sample of the article by the Bureau of Chemistry of this department showed the following results, expressed as grams per 100 liters to 100 proof unless otherwise indicated:

Proof (degrees)-----	147.2
Volatile acid, as acetic-----	3.3
Total acid, as acetic-----	4.1
Fixed acid, as acetic-----	0.8
Esters, as acetic-----	1.2
Aldehydes, as acetic-----	3.6
Furfural-----	0.5
Fusel oil-----	90.9

Odor: Resembles rum.

Taste: Very strong of alcohol and resembles rum.

The results of analysis show the product to be other than true Russian vodka.

Misbranding of the article was alleged in substance in the information for the reason that the following statements appearing on the labels, regarding the article and the ingredients and substances contained therein, to wit, (translation) "Vodka for Passover. * * * Under the supervision of the Rabbi Joseph Michel, of Vilna, overseer of the seals. * * * Vodka for Passover. Rectified. I come to make acquainted that during the time of my travelling from Boston, I turned over my duties of taking care of this vodka, which is made in Zurad, to my friend who is now Rabbi in Boston, and I have found out that he is a great, learned man, also full of knowledge," together with the general appearance of the label and other statements in the Russian and Hebrew languages, were false and misleading in that they indicated to purchasers thereof that the said article was imported vodka, produced in the Empire of Russia; for the further reason that it was labeled as aforesaid so as to deceive and mislead purchasers into the belief that it was an imported vodka, produced in the Empire of Russia, when, in truth and in fact, it was not, but was a domestic product manufactured in the United States of America, to wit, Borough of Brooklyn, City of New York, State of New York; and for the further reason that the article was a domestic product and had been manufactured in the United States of America as aforesaid and purported to be a foreign product, to wit, a product of the Empire of Russia.

On January 15, 1917, the case came on for trial before the court and a jury, and after the submission of evidence and arguments by counsel, the following charge was delivered to the jury on January 19, 1917, by the court (Chatfield, D. J.):

Gentlemen of the jury, I am going to be very brief as to some of these matters and explain more in detail only those which are actually questioned.

In the first place, this is a criminal case; that is, the Government has seen fit to bring this corporation into court, charging that it has violated a statute, and that immediately puts upon the Government the burden of satisfying a jury beyond a reasonable doubt as to every material matter that enters into the charge. So that you start with the proposition that there is nothing against the defendant except as you have heard the case here from the evidence. It is merely present in court, and the Government starts out to show what it charges against it, and presents that for you to listen to, and if they make out a case so as to show you beyond a reasonable doubt that the defendant broke the law in the sense I shall explain later to you, then, of course, your verdict would be guilty. If the Government does not prove the case to that extent, if you have a doubt in your minds as to whether the defendant broke the law in the sense we are to consider, if you can not determine the matter, or if it is evenly balanced in your minds, that means you do not reach the point where you can say they are guilty beyond a reasonable doubt, and in that case your verdict would be for the defendant.

So long as it is a corporation you can see you don't have to give thought to whether it was convicted before, or is of good reputation or bad. A corporation has to use men to do its work. Those men may be good men or bad men. They may be men who abide by the law, or law breakers, but that would not affect the corporation, unless the corporation did something which of itself broke the law. If any witness testifies, he submits himself to you. You can determine whether or not he is telling the truth. The test of all this evidence you have heard is whether, in your mind, it conveys certain facts that you find to be the truth, so that you take those facts and hold them in your memory, so as to use them in reaching this determination, or opinion, as to whether the Government makes out its case. You can see, in doing that, that you must scrutinize as carefully as you can—weigh as carefully as you can—the testimony of everyone who appears in the case. If he is connected with the Government, and his duties are such that it affects his opinion in some of these matters, take that into account, so as to scrutinize it with the idea of determining what you take as facts. When one of the men connected with the defendant testifies, you are to take into account that he is interested from the sense that the result of the case will indirectly affect him, and you have to judge what he says from the standpoint of his connection with the defendant and the standpoint of the way he testifies and what facts he tells you about himself. You can see by that that it is not the quantity of the testimony. There were more witnesses for the Government than the defendant, and yet, if the Government does not make out a case to the extent that I have told you, the number of witnesses does not make any difference.

What I have charged with respect to any corporation is, of course, the law with respect to this particular charge, and so, looking at the evidence—the testimony you have heard—weighing the statements of the witnesses from that standpoint, just fixing these facts so as to see what you do determine, do agree, and thereby arriving at matters which you may consult about together (because you can not reach a verdict until you go to your room and your twelve minds work one with the other so as to result in one verdict), then you will by that process of elimination get certain things which you start out with as the facts which you find, and then, from those, consider next what is the charge against this company, and then see whether the facts prove beyond a reasonable doubt that the charge is made out.

This pure food and drug law, of course, has purposes that in general I think everyone approves of. It is to benefit, or help, the public. It is to prevent the use of articles of food or of drugs that will do harm through the lack of information on the part of those who use something that they think is different from that which it actually is. We need not go into all those possibilities.

In the case of foods, it is intended to do two things; one, to enable the persons to get exactly what they think they are getting, and in the next place to prevent their getting something that may do them harm or may defraud them by making them pay an additional price, or will cause them to be cheated in the various ways that are defined in the statute, by covering up the sale of one thing in place of that which the article purports to be.

In these particular sections we have to do with there are in general two propositions—one as to adulteration, and the other as to misbranding. In this particular case on trial we are concerned with misbranding

When the Government presented the case in court on this information they had three counts. They have withdrawn two of them because of the particular words on which the count was based, and we have one left, which refers to the same act, the same transactions, as those expressed in the other two, and so far as you gentlemen are concerned any one of the three counts would leave the same question to you because, in addition to the statement of it as presented in this paper which is on file, the matter has gone on and been heard upon the testimony, and you are to consider the case as presented from what you heard, not from the way the district attorney or some one in his office may have chosen the language that went into this particular paper.

In count 2, which is the one going before you, they have attempted to charge a case of misbranding. In addition to the fact that it has to do with the question of the sale and use of food products, I must call your attention to the way it gets into this court.

The Constitution gives Congress the right to make certain laws. You understand that the States, for instance, have the right to make police regulations as to a person's conduct (if he is going to commit a burglary or that sort of thing here in Brooklyn), and that the United States, under the Constitution, has the right to make such laws as those stating how a person coming from Vilna, Russia, would get into the United States. There is a definite marked boundary line between the laws that are within the States' jurisdiction and the laws that are applicable to the whole country, and one of those boundary lines is drawn with reference to what is State commerce; that is, business within the boundaries—as far as we are concerned—of New York State, and business that is interstate; that is, for instance, the acts of the people of New York who conduct business with people in some other State. When that happens, the business goes across the State line, and then the Constitution says the United States courts, which will apply the law according to the same standards and feelings in either State, will hear the case, or will have to do with the matter, instead of having the matter determined, perhaps, for a resident of New York by a court in New Jersey. So, where this interstate commerce, where the matters of business (products) are going from one State to the other, Congress has the right to make regulations and to provide for criminal provisions, criminal laws, criminal penalties, for the violation of those laws, so long as it is a regulation of the actual passage of the commercial articles from one State to the other, or the acts of parties who are sending the articles from one State to the other, and who thereby are taking part in something that the United States can control.

So this law was passed with reference to the regulation of food products and drugs, and the acts of persons who were dealing in food products and drugs which went from one State to the other, and intended to do that when they were put into commerce.

You can see that if this Russian Monopol Company was making vodka, that they knew was going to be drunk on the premises, or drunk in Brownsville, it would have nothing to do with commerce in New Jersey, Pennsylvania, Connecticut, or the rest of the world. It would not be interstate or foreign commerce. It could not get out of the State until after it was drunk, and therefore, the commerce part would be local. But if they sold this product to a dealer, like the jobber, Mr. Storm, and he should take a boat, automobile, or wagon and go in Connecticut and peddle it, the vodka would get out of the State and into interstate commerce. And yet, the Monopol Company would have nothing to do with the way it got there except that they made it and started it. So the law made a provision in section 2 of the statute that the introduction into any State from any other State or Territory of any article of food or drugs, which is adulterated or misbranded within the meaning of the act is thereby prohibited. That means that the shipment of the goods is made illegally. The goods could be stopped in shipment if Congress provides the machinery for so doing, and when Congress passes a statute about that they become contraband.

Then the statute goes on to say that if any person shall ship or deliver for shipment from one State to another State, in original unbroken packages, any such article so adulterated or misbranded, within the meaning of this act, or who shall offer for sale in the District of Columbia, or the Territories and so on, any of these misbranded or adulterated articles can be seized and the shipper punished.

You can see that if these goods are sold by a jobber, as you have heard in this case they were sold by the Russian Liquor Company (which has the word

"Russian" in it, but aside from that it might be New York Liquor Company, or anything else) if it was sold by that company to this man in Philadelphia, and if the liquor company did the packing and the shipping and took the goods to the express company or the depot, then the Russian Monopol Company, the manufacturer, never had any idea until they came in court as to just what party got this liquor or what party would drink it. So you can see, if you are merely considering the statute, "No person shall ship or offer for shipment any of these articles," you would immediately say that was the liquor company, and the manufacturer had nothing to do with it. So in order to prevent the manufacturer from sending out something adulterated or misbranded and then having an innocent third party or second party do the shipping, and thereby get in trouble with this statute, Congress went on and said that no dealer (that is jobber) shall be prosecuted when he can establish a guarantee signed by the wholesaler or manufacturer from whom he purchased the article, to the effect that the same is not adulterated or misbranded, and the guarantee shall show the name and address of the party or parties making the sale, and in such case the said party or parties shall be amenable to the prosecution, fines, and other penalties which would attach in due course to the dealer under the provisions of the act.

So by this statute the responsibility for the transshipment of misbranded or adulterated vodka is, if it is shipped, for instance, to Philadelphia, transferred to the party who manufactures it and sells it, so that he may be brought into the shipment. So that knowledge of what is going to be done with it, or how it got there has nothing to do with the case, and this defendant is brought here in Court to answer such a charge. I only explain this because you can dismiss all that part of the case out of this question.

This defendant is brought here charged with this: That it, on a certain date which you have here, here in Brooklyn, manufactured an article which they—I do not mean manufactured, I mean they sold an article, not whether it was actually made by them or bottled by them—that they put it into commercial form, and that they sold it with the idea that it should be put into consumption, and knowing, if it was consumed in New York, or retailed in New York, that the laws of New York would apply; and if anyone sold it out of the State, that the laws of the United States would apply, and they, therefore, attempted to comply with the statute of the United States by giving this guarantee so that the articles could go into interstate commerce, and this they put upon the bottle in print, the guarantee by the Russian Monopol Company, which, of course, shows they are the persons who stand in the position of maker or dealer rather than jobber, "Guaranteed by the Russian Monopol Company under the Pure Food Act," and then it is torn off "30, 1906." So that makes this defendant responsible for whatever happens if you are satisfied beyond a reasonable doubt that the article did go through interstate commerce, and was in the condition that it is brought in here when it went through interstate commerce.

As to that you have the right to consider the testimony of the witnesses, and if you do not believe that this bottle was found in Philadelphia, that it was sold to a Philadelphia man, and that it ever went into interstate commerce, if you are not satisfied of that beyond a reasonable doubt, of course, your verdict will be not guilty.

But there is no serious dispute made of that. Most of the facts as to that were admitted, so you can assume that the defendant is here in court defending or justifying the label and the statements that are upon the bottle upon the facts which, if you believe them as they were stated, indicate that it had furnished a guarantee. You can assume that the goods went into interstate commerce, that thereby the United States has jurisdiction, this statute applied, and that thereby a charge of misbranding would be made out if this article was misbranded so that it would come within the statute. So, if the Government establishes that beyond reasonable doubt, that brings us to the question of what constitutes misbranding and whether or not the defendant is shown beyond reasonable doubt to have sent out this article misbranded.

Now, there are a number of provisions in the law about this term of misbranding. I do not want to read all of them. Section 8 says that the term "misbranded" shall apply to articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular. And in the case of food it shall be deemed misbranded if it be an imitation of or offered

for sale under a distinctive name of another article. That is, if the label be branded so as to deceive or mislead the purchaser or purport to be a foreign product when not so, and if it shall not correctly state the quantity and weight, and so on, or improperly show the ingredients of which it is made. That presents the question you have here. I am not going to go into all the testimony.

You will have to take this up step by step, as I have indicated, and see if the Government has proved beyond reasonable doubt each step, and when you come to consider this last step or question, as to whether there is a misleading label which would make this purport to be a foreign product, and whether it would inform the purchaser as to what were the sort of contents, as to whether it would inform the purchaser so as not to be false and misleading, then you would render your verdict after having reached a conclusion as to the other matters according to the way in which you would answer the question whether the Government has proved beyond a reasonable doubt that this exhibit, this bottle, does have upon it a label that was misleading or which would indicate it was a foreign product when it was not, and whether it is false in any material particular.

Now, then, I must refer to one thing about that. That question you will see does not include this question of knowledge or intent, except in this way: This being a corporation, we can assume that human beings—that is, men—have to do the work, and that, therefore, whoever bottled this liquor, put the labels on, did it with the exercise of some mental process; even if it was done by machinery, somebody had to run the machine and provide the material for it. A corporation could not do that without some service; and although the defendant is a corporation, you must look at it from the same standpoint as if it were a man and that he had done all these acts himself. And the question is this, whether this defendant, assuming the total of its acts is the same as the acts of an individual, used a label which was actually false and misleading and purported to show that this was a foreign product and was intended to deceive people into purchasing it or considering it a foreign product when it was not. And that, of course, involves a proposition or understanding of the language on the label, the way in which the goods would be used and the character of the persons who would buy the goods and the circumstances under which it might be sold.

That brings you to another point. If they had an order to sell these goods to a professor in some college who was known to have a chair for the teaching of the Hebrew language and the Russian language, if they sent this bottle to him, you would judge of the act from the standpoint of the intelligent knowledge of the person who sent it, or who shipped it, and of the person who was going to use it. If the product was going to be sold to the public generally (you have heard testimony enough to indicate as to whether that public constituted those who can read Russian and those who can read Hebrew and those who can read English) those who were interested in a Russian or kosher product to be used by a Jew or sold to some one who wanted spirits, whisky, vodka, or schnaps, or whatever they call it—it contained a fairly large percentage of alcohol—and who was purchasing it without reference to the name or label upon it, simply because of the amount of alcohol in it.

All those customers are within the knowledge of possible intent. In so far as they told you what the customers were, you can judge of the knowledge of those customers. You can view whether this label could not be misleading and whether it was not a label for that purpose at all, whether it was a label that might deceive somebody, or whether it was intended to be misleading, deceiving, and would purport to show something not in the bottle to those who would be deceived. You can see if they took an old tomato catsup bottle and put this product in it and the words "Tomato Catsup" were blown in the bottle it would be ridiculous for somebody to charge it was not tomato catsup unless we had other facts to raise that question. But if they sell a product that is called tomato catsup as a liquor, and when it is sold to anyone who wants that kind of liquor, you are to consider whether it would mislead or deceive, or purport to be some other article, to any of those who might have occasion to purchase it upon the statement on the label or the oral statement of those who passed it off with that label.

That brings us to the contents of the label. You have had the testimony of the picture of the rabbi, and this statement that it is all right for Passover use, so the Jews would be satisfied. You have had the statement that it has Russian in print upon it, so those who have learned to use vodka or had something to do with the kosher vodka, because they had some tie back to Russia,

would understand that this had also had some tie or connection with the Russian product. You have heard the testimony that the certificates that the rabbis put on were so that the Jews would be satisfied it was all right for them, and also that there was a rabbi who was either in Vilna, or had been in Vilna, or had been made a rabbi in Vilna, or had some connection with Vilna, so that he said he was "from Vilna," so that this substance would be connected by analogy with the substance that the people would consider Russian.

There is no harm in any of that. That does not bring them within the statute. That simply explains the way this link or tie was to be used here and the product known in Russia was made.

When you come down to the express wording, the express language upon the label, and the way in which it was printed, then you have to consider generally this question: If instead of printing these labels all in Yiddish or all in Hebrew or all in Russian and then putting on another label which should be all in another language (for instance, if Russian were used first, if they put on a complete label that would have all the reading in Hebrew, and then another label for Yiddish, and then a fourth label, perhaps, which would have it all in English, which you know is one of the ways of conveying the information to anybody who might use it), if instead of so doing they used one language for each line or statement, and then when they got to the next line or statement they used a different language (as, I say, if some of the characters are Russian, some of the characters are Jewish, some of the characters of Yiddish), so it would evidently indicate only a part of the information to those who would recognize only a part of the characters, then the question comes directly to you, gentlemen of the jury, as to whether you see any misleading or deceiving method or choice of words, choice of print, choice of arrangement, or whether any of the statements would inform persons dealing with this or purchasing it that it was not actually Russian vodka. You have to see if that is proven beyond a reasonable doubt.

Now, you have had some testimony as to the price of imported vodka, or as to the use of imported vodka—if people could get it, or wanted to get it, or wanted to pay the price for it—and the issue really is a comparatively narrow one.

If the Government satisfies you beyond a reasonable doubt, having made out the other things I told you must enter into the situation, that this label and the paster and the words on the inside or backside of the label were written in the form they were, so as to indicate to any of the people of these different races or nationalities that this article was something other than they would suppose it to be; and if they were misled either in buying it for something else or in paying a greater price for what was not worth so much, or in assuming they were getting one thing when they were getting another; and if the Government proves beyond a reasonable doubt that the labels were put on and created in this form, so as to make it possible to do that, then the defendant is guilty of misbranding.

On the other hand, if the Government does not prove the case to that extent, or if the testimony indicates that these labels and the way they were printed, and so on, represent merely a haphazard attempt to describe the product by issuing something that could be read or located or understood by those of the different races that were trying to identify the product; and if the label merely would sell the goods to those who did not care where they came from, and would not be deceived in what they were buying, or who would pay no attention to what they were buying; and if, therefore, this label was not prepared so as to work a deception in cases where it could deceive or would be likely to deceive, then your verdict should be not guilty.

It practically comes down, as I say (if you believe the testimony of the witnesses as to the undisputed points, and if you have got definitely in your minds the purpose and extent of this statute) to this simple question of fact, as to whether or not the labels and language were put on and sold, and whether the intelligent or knowing use of this form of bottling and the words on the labels that were put on there was such that it would come within the prohibition of the statute and deceive persons who were buying something they thought was something else because of the way it was printed. If the Government proves that beyond a reasonable doubt, your verdict should be guilty.

I have said quite a lot about it because it is not a matter that could actually be stated in a few words. There are too many points in the case, but when you get down to the issue, if you get the idea, it is a simple question, and that rests with you.

Mr. ALTMAN. I think the charge was so eminently fair to both sides that I have nothing to add. However, the district attorney in summing up said that if the Government had produced witnesses to show that they were deceived, or received an article which they did not ask for, or asked for Russian liquor and received this, that they would not have been permitted to so testify. I ask your honor to charge that it is the law if persons had been produced who went and asked for any kind of liquor, they could have testified as to what they received and asked for, and whether they were deceived or not.

The COURT. I shall simply charge the jury that if there had been any witness here who could have testified, so that it could be evidence, as to just how he purchased an article, just what he understood about it, just what intelligence was conveyed to him either by what was said or by the label, I might let him testify. But, on the other hand, what I should charge if a man came here and said he could not read this thing at all but that he understood enough from something or other, I should probably exclude the testimony on the ground that he was not giving facts but that he was giving a sort of conclusion, not evidence. I could not charge on that proposition. We did not have this witness. You have the question: What would be the effect upon these ordinary individuals described in the testimony? And you have got to create a sort of purchaser in your minds, as well as what he would understand.

Mr. SMITH. In that connection, I will ask the court to charge that it was not necessary for the Government to produce persons to testify in actual instances that they had been deceived by the label.

The COURT. No. I do so charge that.

Mr. SMITH. I ask your honor to charge that as to the interstate shipment the jury can take into account the admissions of the guaranty and the testimony of Dr. McIntyre, who purchased this bottle.

The COURT. That is not disputed. There is no evidence to contradict it. The jury does not need to believe the evidence at all if there is anything in the case that leads them to believe the case was made up and the things charged did not happen. But the shipment and sale is not disputed, and undisputed testimony should be believed unless you see some reason to disregard it. The positively false statement appears on the labels.

Mr. SMITH. I ask your honor to charge that if the jury is satisfied beyond a reasonable doubt that this label, or these labels, as a whole or in part, are likely to create the impression—a mistaken impression—that this is a foreign product, they may find the offense of misbranding was committed, although no positively false statement appears on the labels.

The COURT. Yes. If the effect of the whole would cause that, you do not have to find any particular word or statement on which to base your opinion. I so charge. I think I have.

The jury thereupon retired and after due deliberation returned a verdict of guilty, and on February 17, 1917, the court imposed a fine of \$199.

CARL VROOMAN, *Acting Secretary of Agriculture.*